#kill0sum:
Towards sufficiently selective data retention

Panel 5 | The death of data retention at EU level
Conference 'Freedom AND Security. Killing the zero sum process'
ERA & Europol's Data Protection Experts Network (EDEN)
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Prof. Dr. Gert Vermeulen
t. +32 9 264 69 43
f. +32 9 264 84 94
Gert.Vermeulen@UGent.be

GHENT UNIVERSITY
FACULTY OF LAW AND CRIMINOLOGY
IRCP Institute for International Research on Criminal Policy
Ghent University
PIXELS
Ghent University Knowledge and Research Platform on Privacy, Information Exchange, Law Enforcement & Surveillance

Relevant CJEU case law

invalidating both EU & US generalised data retention practices

- 2014 Digital Rights Ireland (invalidating EU Data Retention Directive)
- 2015 Schrems v Data Protection Commissioner (invalidating Safe Harbour)
- 2016 Tele2 Sverige AB (data retention ePrivacy Directive)
- 2016 *Quadrature du Net* and Others v Commission (Privacy Shield; pending)
- Schrems III (SCC, preliminary ruling y Irish High Court; pending)
  - High Court decision October 2017: distinction mass/bulk *searching* (targeted, not indiscriminate), but involving the collection of non-relevant data, i.e. bulk *acquisition, collection or retention* = mass indiscriminate processing (Upstream)

not contradicted by

- PNR Canada Opinion (per se selective)
- Big Brother Watch and Others v UK (no reasonable suspicion required)

Prof. Dr. Gert Vermeulen
+32 9 264 69 43
Gert.Vermeulen@UGent.be

CJEU data retention-collection-storage standards | 1

- may not happen on a generalised basis
- may not be indiscriminate
- may not be bulk-collection
- must be limited to what is strictly necessary
- requires differentiation, limitation or exception in light of the objective pursued
- must be targeted (at least not fully untargeted; scope for 'relatively untargeted')
- must be limited to data pertaining to a particular time period and/or a particular geographical zone and/or to a circle of particular persons

Prof. Dr. Gert Vermeulen
+32 9 264 69 43
Gert.Vermeulen@UGent.be

CJEU data retention-collection-storage standards | 2

- must be limited with respect to (cumulatively):
  - the categories of data to be retained
  - the means of communication affected
  - the retention period adopted
  - the "persons concerned" or "the public that may potentially be affected"
- must be defined on the basis of objective evidence which makes it possible to identify a public whose data is likely to reveal a link, at least an indirect one, with serious criminal offences, and to contribute in one way or another to fighting serious crime or to preventing a serious risk to public security
- does not need to amount to 'reasonable suspicion', the requirement of which was dismissed in Big Brother Watch and Others v UK (ECtHR, 2018)

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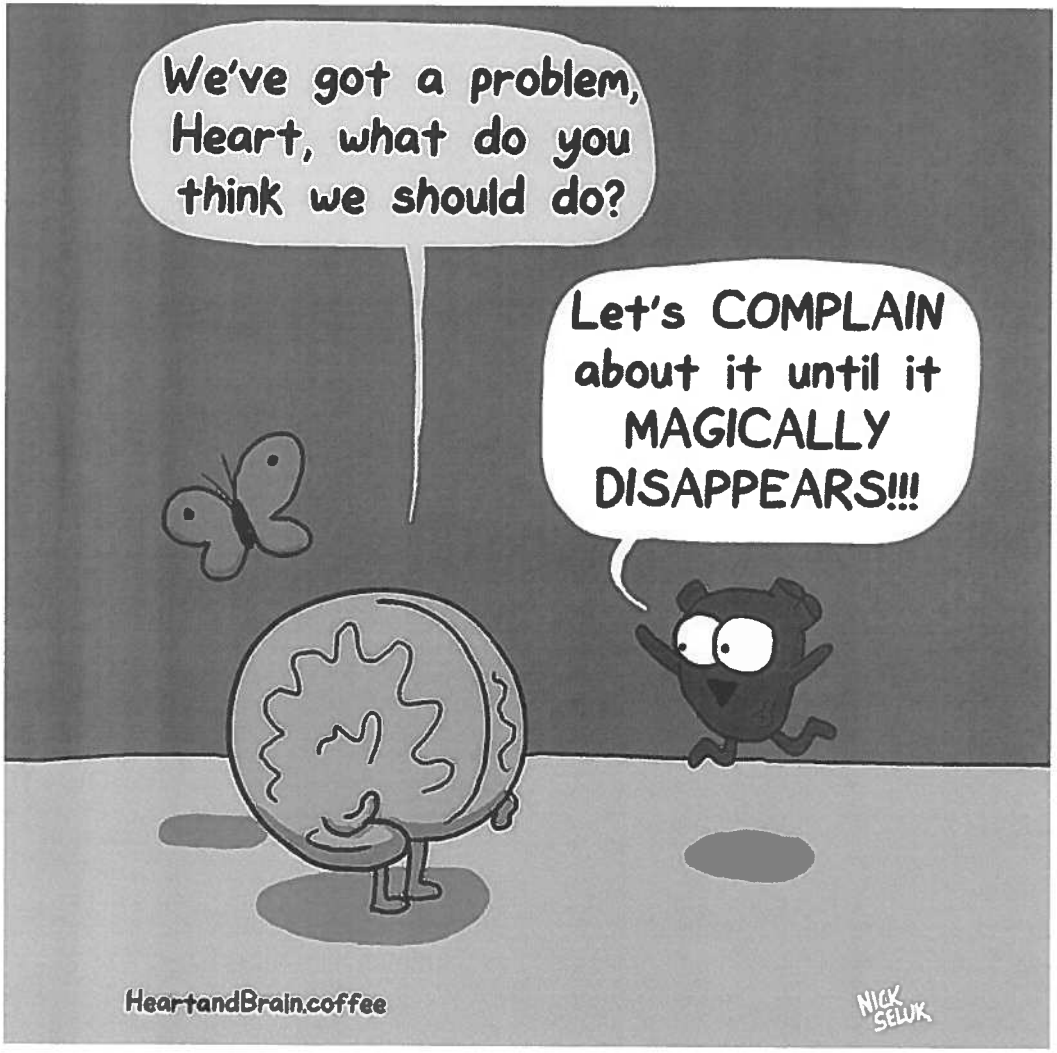
#kill0sum | Sufficiently selective data retention?



IRCP Institute for International Research on Criminal Policy
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#kill0sum | Mind the traps | 1

relevant EU legislation

- Artt. 9 and 22 GDPR
- Att. 10-11 LED and relevant recitals (37-38)

prohibited automated processing, including profiling

- when producing adverse legal effects or significantly affecting the data subject: prohibited unless authorised by EU or MS law + appropriate safeguards, including the right to human intervention

discriminatory effects (direct or indirect)

- counter to Artt. 21 and 52 Charter

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#kill0sum | Mind the traps | 2

use of special ('sensitive') data categories (either or not in profiling)

- processing revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation
- allowed only where strictly necessary, subject to appropriate safeguards for the data subject, and only where authorised by Union or MS law
- 'appropriate safeguards': e.g. only in connection with other data on the natural person concerned, the possibility to secure the data collected adequately, stricter rules on the access of staff, and prohibition of transmission
  - ! many examples of avoiding discrimination by combining with other data

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#kill0sum | Checklist: evidence, feasible, lawful?

irrespective of

- selectors/discriminants used
- type of info the retention is envisaged of (subscriber data, access data, transactional data, geo-location data, content data, …)

check

- evidence base? (objective or objectifiable)
- feasibility of implementation? (technical, operational, financial, …)
- use of sensitive data (profiling)? (requiring an explicit legal basis and appropriate, suitable safeguards)
- discriminatory effect? (direct or indirect?)

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#kill0sum | Possible selectors or discriminants

ratione personae (characteristics of targeted persons)

- age, gender, nationality, racial or ethnic origin, political opinion, religious or philosophical beliefs, membership (of an association, trade union, ...), ...

ratione loci (residence or presence of targeted persons)

- city, street, neighbourhood, public space, square, ...

ratione itineris (targeted routes of communications or data flows, in terms of origin, transit, destination or combinations thereof)

- country/city, neighbourhood/building, server, company, hotspot, provider, ...

ratione temporis (targeted period or time frame(s))

- month/week/day/time-slot, event-based (concert, Xmas market, football match, ...), suspicious timings, ...

ratione instrumenti (targeting persons using certain means of communication)

- use(rs) of certain communication means (Signal, Telegram, ...), encryption tools, secure VPN's, ..., foreign (unregistered) sim cards (roaming), ...

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Discussion | Q&A

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www.ircp.org

Contact

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t. +32 9 264 69 43
f. +32 9 264 84 94
Gert.Vermeulen@UGent.be

in http://www.linkedin.com/in/gert-vermeulen-42b00068

IRCP

Ghent University
Universiteitstraat 4
B – 9000 Ghent

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